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November 4, 1999

BY HAND

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W. – Suite TW-A325
Washington, D.C. 20554

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NOV 4 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket No. 98-147

Dear Ms. Salas:

On November 3, 1999, Steven Gorosh, General Counsel of NorthPoint Communications, Inc. (NorthPoint), Michael Olsen, Deputy General Counsel of NorthPoint, Ronald L. Parrish, Vice President, Industry and Government Affairs of Tandy Corporation and Richard Metzger of Lawler, Metzger and Milkman, LLC, counsel to NorthPoint, met with: Commissioner Furchtgott-Roth and Rebecca Beynon, Legal Advisor to Commissioner Furchtgott-Roth; Commissioner Ness, Linda Kinney, Legal Advisor to Commissioner Ness, Lawrence Strickling, Chief, Common Carrier Bureau and David Fligor, Intern in Commissioner Ness's office; and Commissioner Powell and Kyle Dixon, Legal Advisor to Commissioner Powell. On November 4, 1999, Messrs Gorosh, Olsen, Parrish and Metzger met with: Chairman Kennard, Kathy Brown, Chief of Staff and Dorothy Attwood, Legal Advisor to Chairman Kennard; and Commissioner Tristani and Sarah Whitesell, Legal Advisor to Commissioner Tristani.

In the course of these meetings, NorthPoint's representatives expressed the company's views on different issues pending before the Commission in the above-referenced proceeding. Those views are reflected in the documents enclosed herewith for filing as well as in NorthPoint's comments and prior written *ex parte* submissions in this proceeding. In addition, Mr. Parrish played a videotape, which is enclosed herewith for filing, and described the partnership between NorthPoint and Tandy to market digital subscriber line service to residential customers.

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Pursuant to section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. §1.1206(b)(1), an original and one copy of this letter and enclosed documents and videotape are being provided to you for inclusion in the public record of the above-referenced proceeding.

Very truly yours,

A. Richard Metzger, Jr.

A. Richard Metzger, Jr.

cc:	Chairman Kennard	Kathy Brown Dorothy Attwood
	Commissioner Furchtgott-Roth	Rebecca Beynon
	Commissioner Ness	Linda Kinney Lawrence Strickling David Fligor
	Commissioner Powell	Kyle Dixon
	Commissioner Tristani	Sarah Whitesell

November 4, 1999
CC Docket No. 98-147
NorthPoint/Tandy
EX PARTE
Enclosure

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Competitive DSL for Residential Consumers

Line Sharing Pricing, Implementation and Enforcement

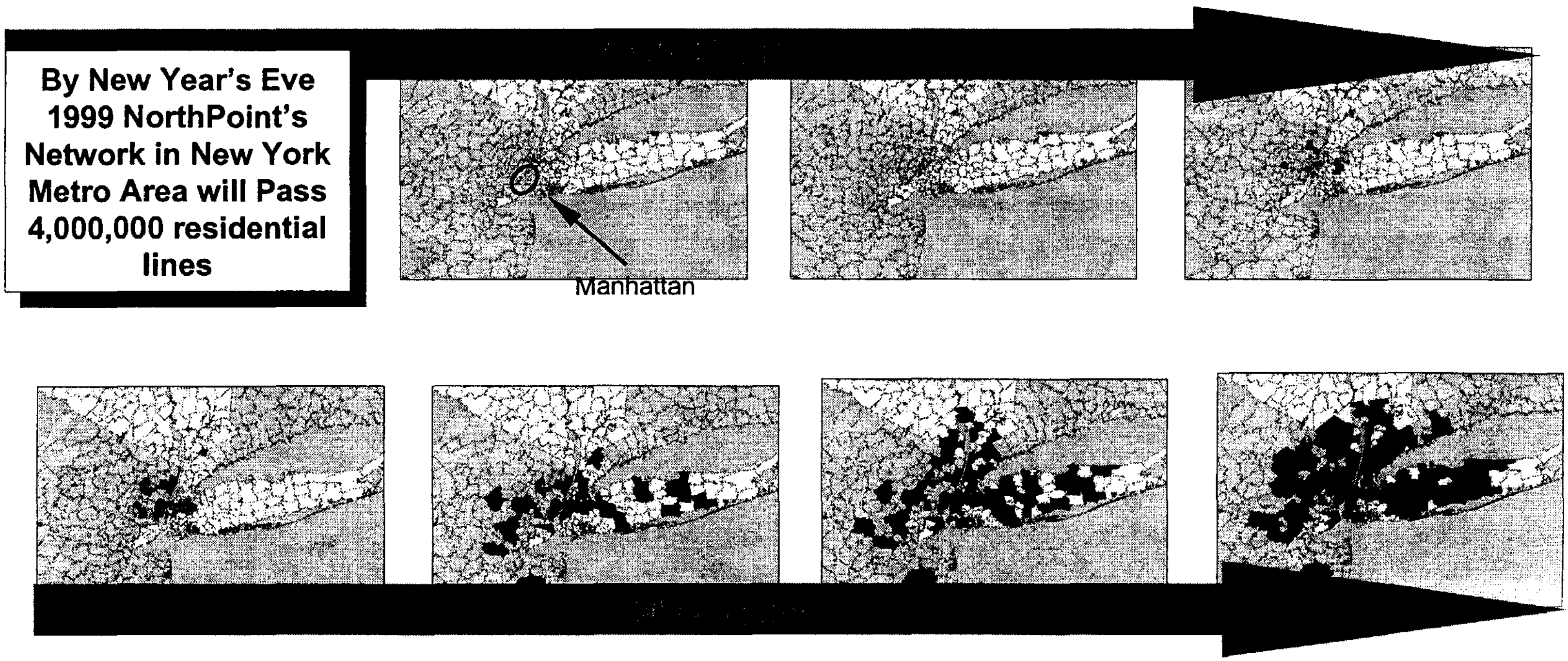
NorthPoint Communications
Steven Gorosh, Vice President & General Counsel
Michael Olsen, Deputy General Counsel
Tandy/Radio Shack
Ronald Parrish,
Vice President Industry and Government Affairs

Key Issues for Residential Broadband

- Competition is essential to ensuring innovation and deployment of residential broadband DSL
- Vigorous DSL competition for residential subscribers is impossible without line sharing and price squeeze relief
- No serious technical, operational, OSS or pricing issues have survived 2 years of careful scrutiny
- Prompt implementation and cost-based pricing in this order are absolutely critical to line sharing success

NorthPoint facilities investment in DSL

- Depth: NorthPoint continues to invest to expand the reach of its DSL network in each metro area where NorthPoint is deployed.

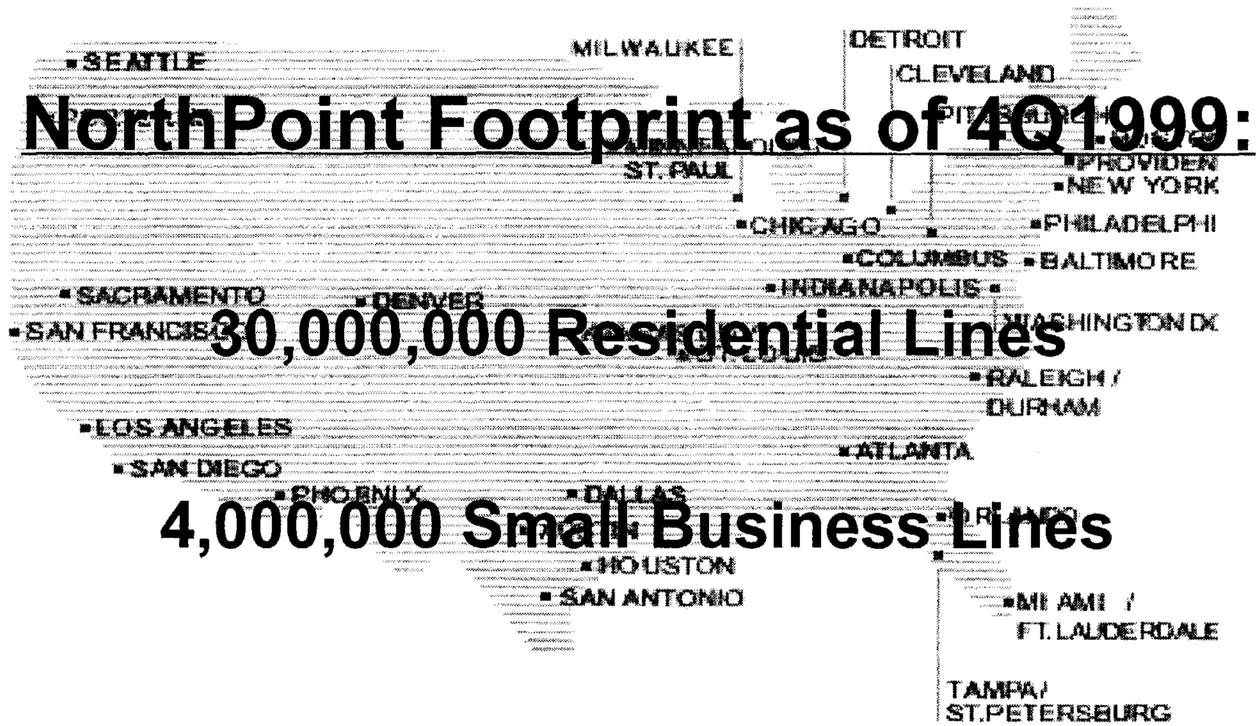


NorthPoint facilities investment in DSL

- Breadth NorthPoint continues to extend its national coverage by deploying into new metro areas across the nation.

Atlanta	**Austin**	**Baltimore**
Boston	**Chicago**	**Cleveland**
Dallas	**Denver**	**Detroit**
Houston	**Indianapolis**	**Los Angeles**
Miami/Ft. Lauderdale	**Milwaukee**	**Minneapolis/St. Paul**
New York	**Orlando**	**Philadelphia**
Phoenix	**Pittsburgh**	**Portland**
Raleigh/Durham	**San Diego**	**Columbus**
Kansas City	**Providence**	**Sacramento**
San Antonio		

NorthPoint facilities investment in DSL - today



NorthPoint Footprint as of 4Q1999:

30,000,000 Residential Lines

4,000,000 Small Business Lines

RadioShack.

NorthPoint

NorthPoint facilities investment in DSL – tomorrow

NorthPoint Year 2000 Expansion Plans

Wednesday, October 27, 1999

Company Press Release

SOURCE: NorthPoint Communications

NorthPoint Communications Unveils DSL Network Expansion Plans; Broadband Network to Pass Approximately Half of All U.S. Businesses and Homes Next Year

SAN FRANCISCO, Oct. 27 /PRNewswire/ -- NorthPoint Communications (Nasdaq: NPNT - news) today announced plans to extend its national digital subscriber line (DSL) network to more than 50 percent of all businesses and nearly 45 percent of all homes in the United States by the end of next year. Already available in more markets nationwide than any other DSL service, these expansion plans will make NorthPoint's high-quality DSL offering available to more U.S. businesses and consumers than any other competitive provider.

NorthPoint plans to expand its network to serve subscribers in 32 new markets, increasing its presence to a total of 60 major metropolitan areas and 110 MSAs. NorthPoint DSL is currently [illegible]le in 28 markets and 51 MSAs.

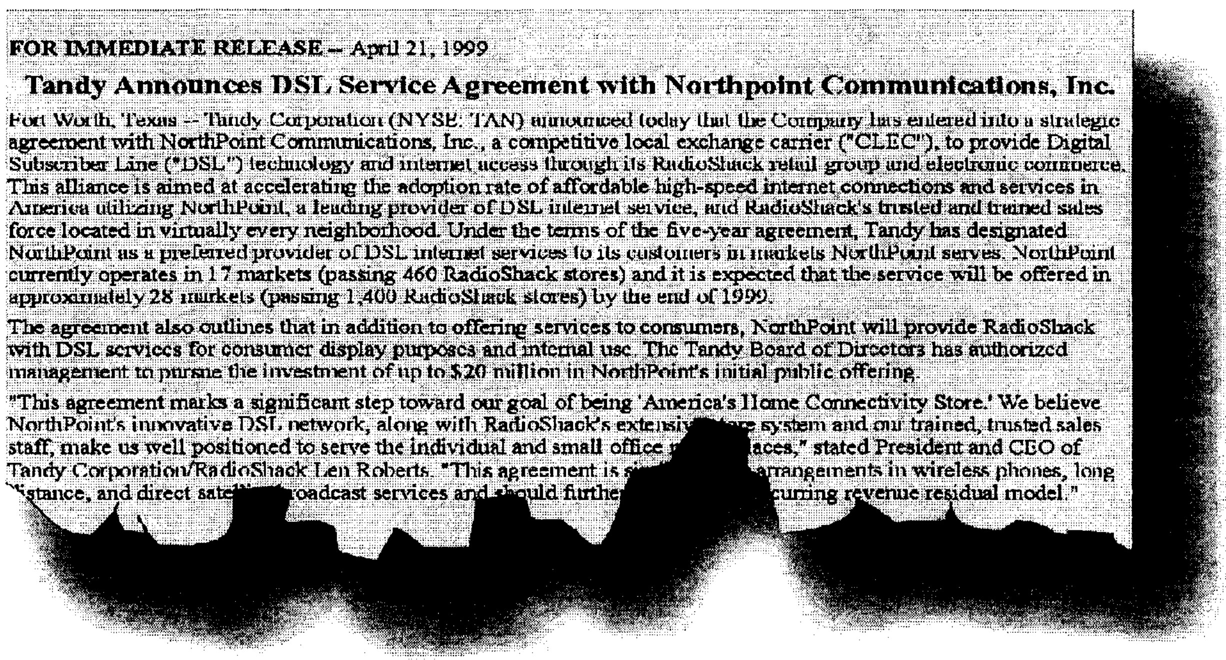
Upon completion of its network build, NorthPoint's DSL network wi[illegible] percent of all businesses and 75 percent of homes in the [illegible]kets it serves.

- Alabama - Birmingham
- Arizona - Tucson
- California - Fresno, Sacramento, Santa Barbara
- Connecticut - Hartford
- Florida - Jacksonville
- Kansas - Kansas City, Wichita
- Kentucky - Louisville
- Louisiana - New Orleans
- Michigan - Grand Rapids
- Nevada - Las Vegas
- New Mexico - Albuquerque
- New York - Albany, Buffalo, Rochester, Syracuse
- North Carolina - Charlotte, Greensboro
- Ohio - Cincinnati, Columbus, Dayton
- Oklahoma - Oklahoma City
- Pennsylvania - Harrisburg
- Rhode Island - Providence
- Tennessee - Memphis, Nashville
- Texas - San Antonio
- Utah - Salt Lake City
- Virginia - Norfolk, Richmond

NorthPoint/Tandy Residential DSL Partnership

<u>NorthPoint and Tandy announce strategic partnership</u>

to accelerate residential deployment of broadband services



FOR IMMEDIATE RELEASE – April 21, 1999

Tandy Announces DSL Service Agreement with Northpoint Communications, Inc.

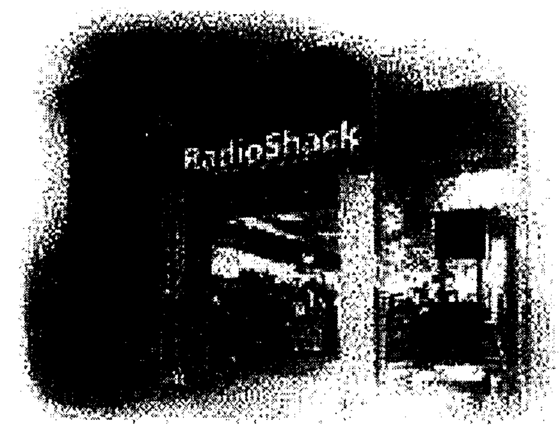
Fort Worth, Texas -- Tandy Corporation (NYSE: TAN) announced today that the Company has entered into a strategic agreement with NorthPoint Communications, Inc., a competitive local exchange carrier ("CLEC"), to provide Digital Subscriber Line ("DSL") technology and internet access through its RadioShack retail group and electronic commerce. This alliance is aimed at accelerating the adoption rate of affordable high-speed internet connections and services in America utilizing NorthPoint, a leading provider of DSL internet service, and RadioShack's trusted and trained sales force located in virtually every neighborhood. Under the terms of the five-year agreement, Tandy has designated NorthPoint as a preferred provider of DSL internet services to its customers in markets NorthPoint serves. NorthPoint currently operates in 17 markets (passing 460 RadioShack stores) and it is expected that the service will be offered in approximately 28 markets (passing 1,400 RadioShack stores) by the end of 1999.

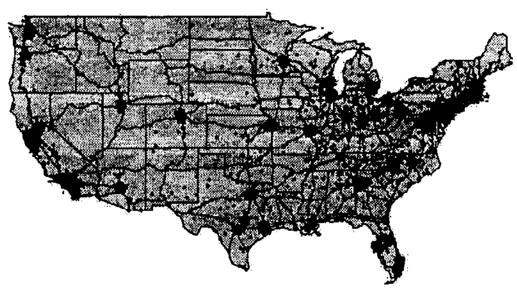
The agreement also outlines that in addition to offering services to consumers, NorthPoint will provide RadioShack with DSL services for consumer display purposes and internal use. The Tandy Board of Directors has authorized management to pursue the investment of up to $20 million in NorthPoint's initial public offering.

"This agreement marks a significant step toward our goal of being 'America's Home Connectivity Store.' We believe NorthPoint's innovative DSL network, along with RadioShack's extensiv[illegible] system and our trained, trusted sales staff, make us well positioned to serve the individual and small office [illegible]aces," stated President and CEO of Tandy Corporation/RadioShack Len Roberts. "This agreement is s[illegible] arrangements in wireless phones, long [illegible]istance, and direct sate[illegible]roadcast services and should furthe[illegible]curring revenue residual model."

RadioShack Strategic Focus: Home Connectivity

- **Tandy/RadioShack** five-year strategic plan points to "The Home Connectivity Store"
- By YE2000, **RadioShack** will demonstrate broadband service in all 5,000 stores – in-store demo is KEY to rapid consumer deployment
- Emerging market served by D-I-F-M (Do-it-for-me) rather than D-I-Y (do-it-yourself)
- **RadioShack** building national home installation and repair service through **AmeriLink** subsidiary
- **RadioShack-NorthPoint** provides turnkey home connectivity at affordable cost



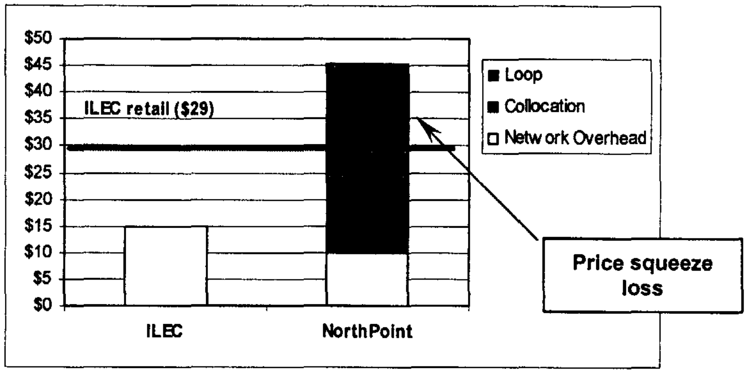


Combined RadioShack-NorthPoint footprint will allow consumers buy broadband service "on-the-spot" in more than 2,500 RadioShack stores nationwide by Year-End 2000

Key obstacle to consumer deployment: absence of competitive line sharing

Line sharing essential to address residential market

- DSL price squeeze continues to prevent competitive DSL CLECs from economically serving residential users
  - Bell Atlantic wholesale residential (shared-line) ADSL is about $24 per month
  - Bell Atlantic stand-alone DSL UNE loop is $12 to $24 per month, plus collocation and other non-recurring charges
  - UNE loop and collocation costs cause DSL CLECs lose money on every line before recovering transport, network, electronics, overhead and profit
  - Line sharing pricing at Incumbent parity will eliminate pernicious DSL price squeeze.



- Line Sharing is necessary to alleviate "no facilities" rejects – many residential loops passed by NorthPoint are already "occupied" with POTS services
  - For those customers, the ONLY DSL option is the Incumbent's shared-line service
  - Absent line sharing, NorthPoint's addressable market will be substantially smaller than the 30M residential line footprint

Key obstacle to consumer deployment: absence of competitive line sharing

- DSL CLECs beat the Incumbents to market with DSL in <u>every</u> major market in the nation
- Incumbents used slow-roll provisioning, litigation and exclusion from access to shared lines to slow CLECs while Incumbents slowly began to deploy and market their own service in competition with DSL CLECs
- ILECs have one-year head start in residential deployment and in securing key partners (AOL etc.) because they retain exclusive access to residential market
- ILECs advantage in residential market and with key partners is not based on superior technology, service, or value, but on their ability to leverage monopoly in captive voice market – 99.9% residential customers must use ILEC DSL to get efficiency of shared line
- ILEC technical, then operational, then pricing and implementation "objections" to line sharing have proven hollow, but have afforded them a further lead by delaying action on line sharing
- Because DSL is relatively new, preventing Incumbents from further leveraging their voice monopoly into this market is essential to ensuring robust competition going forward

Line Sharing: Implementation

- **No Technical Issues**
  - CLEC standardized ADSL (T1.413-1998) is *identical* to ILEC deployment
  - Fully tested in US West trial in Minnesota
  - ILECs have abandoned technical opposition
- **No Operational Issues**
  - Two-carrier line sharing is not a substantial technical change from existing services:
    - ILEC wholesale DSL has two customers for billing, maintenance, customer care (end-user and ISP)
    - DAML (digital added main lines) are single loops with two customers
  - SBC/AIT separate affiliate uses shared lines in the *exact same manner* as DSL CLECs will use shared lines
  - ILECs have retreated from operational opposition

Line Sharing: Implementation

- OSS implementation
  - DSL CLECs submitted the only substantial record on implementing line sharing (MTG 9/30/99)
    - Incremental changes to operations (manual) can be implemented sufficient to permit 2-carrier line sharing in one month
    - Complete system changes sufficient to permit flow-through implementation of 2-carrier line sharing can be completed in less than six months
    - MTG Statement, Table 1 explains in detail all OSS system changes needed to implement 2-carrier line sharing immediately

Line Sharing: Implementation

- OSS Implementation

  ILECs have retreated dramatically from extravagant cost and implementation claims

Then	**Now**
OSS upgrades will cost "hundreds of millions and more" and take "several" years (SBC 6/15/99)	OSS ordering changes as low as $700,000 (USW 10/7/99); Implementation with manual processes and special techs "immediate". (BellSouth 8/31/99)
Billing systems need "major overhaul… redesign and rewrite all billing systems at enormous expense…" (USW 7/22/99)	Billing OSS changes as low as $80,000 (USW 10/7/99)
Repair and Maintenance OSS "would have to [be] redesign[ed] as a result of line sharing." (USW 7/22/99)	Repair and Maintenance OSS upgrades $80-100,000. (USW 10/7/99)

RadioShack.

NorthPoint

Line Sharing: Implementation

- OSS Implementation
  - ILECs have failed to rebut evidence that flow-through provisioning can be completed in six months
  - ILECs should be permitted six months to make available shared line access only if:
    - ILECs take immediate steps to eliminate price squeeze by reducing substantially prices on stand-alone DSL loops that CLECs are forced to take (surrogate pricing) (See eg SBC/AIT merger conditions)
    - Implementation is firm, complete, and backed by substantial penalties and enforcement measures (compliance) (Cf. collocation experience)
    - ILECs are permitted no leeway in perpetuating DSL price squeeze by brazenly discriminating in pricing against DSL CLECs (See, e.g., USW proposal to price shared lines at $20 to DSL CLECs, $0 to USW [10/7/99].)

RadioShack.

NorthPoint

Line Sharing: Implementation Milestones

- Implementation must be ensured with regular milestones
  - Interim (immediate) line sharing implementation (completed in 6 months)
    - CLEC requests interim line sharing UNE amendment to ICA
    - ILEC proposes implementation plan, offers compliant amendment
    - CLEC & ILEC have opportunity to collaborate on implementation issues
    - Implementation begins on date certain at six months
  - Long term line sharing requires State action, parity pricing and implementation

Line Sharing: Pricing

- Eliminate DSL price squeeze, preclude ILEC "gaming" of line sharing

Reject US West proposal for facially anti-competitive "competitive surcharge" on shared loops: $0 for US West, $20 for competitors

  - Interim prices set by Commission to preclude DSL price squeeze
    - Loop, splitter, cross-connect recurring and non-recurring charges may *not exceed* costs that ILEC reflects in its own services for same functionality
    - No additional OSS charges pending completion of negotiation/arbitration process
    - Interim prices subject to "true-up" at conclusion of state price proceedings (addresses any "takings" or unlawful federal intrusion claims).

Line Sharing: Enforcement

- Ensure that benefits of line sharing are delivered promptly to consumers to exploit huge DSL CLEC investment
  - Section 251, 271 jeopardy for failure to maintain progress, implement and deliver timely
  - Section 208 complaints and penalties
  - Section 503(b)(1)(B) and (2)(b) forfeiture proceedings

RadioShack.

NorthPoint

Line Sharing

Pricing

&

OSS Filings

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October 22, 1999

By Hand

Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

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OCT 22 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Written *Ex Parte* Communication
In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability
CC Docket No. 98-147

Dear Mr. Strickling:

This written *ex parte* is submitted in response to *ex parte* communications filed recently in the above-referenced proceeding by U S West, Inc. (U S West) and SBC Telecommunications, Inc. (SBC), on October 15, 1999 and October 8, 1999, respectively. This *ex parte* is submitted on behalf of NorthPoint Communications, Inc. (NorthPoint) and HarvardNet, Inc. (HarvardNet), which provide Digital Subscriber Line (DSL) services in markets across the country.

The U S West and SBC submissions represent the latest effort by incumbent local exchange carriers (LECs) to protect their residential markets from competition for DSL service. DSL competitive LECs have shown through their comments and written *ex parte* submissions in this docket that the Commission should: 1) require incumbent LECs promptly to offer access to line sharing as an unbundled network element for the provision of asymmetric DSL services by competitive LECs; 2) adopt specific pricing principles and guidelines for line sharing to assist state commissions in carrying out their responsibilities under section 252 of the Communications Act of 1934, as amended (Act); and 3) require incumbent LECs to offer line sharing on an interim basis, pending completion of the section 252 process, in order to facilitate the expeditious delivery of the benefits of DSL competition to residential consumers and to prevent incumbent LECs from continuing to exploit their position as the monopoly provider of DSL service to those consumers. So long as incumbent LECs remain the exclusive providers of DSL service over a shared line, DSL competitive LECs will remain at a severe competitive disadvantage in attempting to compete to serve residential customers.[1]

[1] Line sharing is not essential for DSL competitive LECs to serve business customers because those subscribers typically prefer to have DSL service provided over a different loop than the loop over which they receive voice service.

The U S West and SBC submissions raise technical/operational objections[2] as well as legal challenges to the proposals of the DSL competitive LECs. In this written *ex parte*, we address the legal arguments advanced by the incumbent LECs. The DSL competitive LECs have addressed other objections, especially those that are based on Operations Support Systems concerns, in separate *ex parte* submissions.[3] Although the U S West and SBC submissions do not directly challenge the proposals advanced by NorthPoint and HarvardNet in their October 8, 1999 written *ex parte* in this proceeding (October 8 Ex Parte), some may view the legal arguments as applicable to those proposals as well.

U S West and SBC generally contend that even if the Commission required incumbent LECs to offer line sharing as an unbundled network element to unaffiliated competitive LECs, the agency lacks authority to order incumbent LECs to provide line sharing on an interim basis, pending the amendment of their interconnection agreements with affected competitive LECs.[4] Moreover, U S West and SBC raise various challenges to pricing guidelines that DSL competitive LECs have urged the Commission to adopt in conjunction with a requirement that line sharing be offered as an unbundled network element.[5] In this *ex parte,* we show that these claims are meritless and should be rejected.

Both U S West and SBC emphasize that under the statutory scheme established by the Act, state commissions have the exclusive authority to establish the specific prices for access to unbundled network elements. We agree. Section 252 of the Act, 47 U.S.C. § 252, assigns to the state commissions the authority to set the prices for specific unbundled network elements if the parties are unable to reach agreement through the negotiation process. The Commission, however, has the overriding responsibility for administering the Act. As the Supreme Court observed when it recently upheld the FCC's jurisdiction to design a pricing methodology for UNEs, "[w]e think that the grant in § 201(b) means what it says: The Commission has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996."[6] Consistent with that responsibility, DSL competitive LECs have recommended specific guidelines that the Commission can and should adopt to furnish state commissions with a methodology that they can apply in setting specific prices for access to line sharing. For example NorthPoint and HarvardNet recommended in their October 8 Ex Parte that the Commission adopt a pricing principle that would require state commissions to ensure that the price of the loop component of

2 U S West Letter at 4; SBCLetter at 3

3 *See* Letter to Magalie Roman Salas, Secretary from Dennis J. Austin, CC Docket No. 98-147 (October 19, 1999); Letter to Magalie Roman Salas, Secretary from Michael E. Olsen, CC Docket No. 98-147 (September 30, 1999).

4 U S West Letter at 1-2; SBC Letter at 1-2.

5 U S West Letter at 1-3; SBC Letter at 2.

6 *AT&T Corp. v. Iowa Uitils. Bd,* __ U.S. __, 119 S.Ct. 721, 730 (1999).

line sharing not exceed the loop cost that an incumbent allocates to its own DSL service provided over a shared line.[7] It perhaps bears emphasis that the two state commissions that commented on this issue in the rulemaking proceeding both urged the Commission to adopt pricing rules for line sharing.[8]

U S West and SBC do not appear to challenge the FCC's jurisdiction to establish such pricing guidelines for state commissions to apply if the parties are unable to reach agreement through the negotiation process. Rather, they claim that the FCC lacks authority to establish pricing principles that would apply to the incumbent LECs' provision of line sharing on an interim basis, as DSL competitive LECs have advocated.[9] Under the proposal advanced by NorthPoint and HarvardNet, for example, Commission-established pricing rules would be used by incumbent LECs to set interim prices for line sharing that would remain in effect until they are superseded by amended interconnection agreements, pursuant to the process set forth in section 252 of the Act, 47 U.S.C. § 252. As the Eighth Circuit has observed, "substantial deference by courts is accorded to an agency when the issue concerns interim relief."[10]

Contrary to the claims of U S West and SBC, the procedure recommended by NorthPoint and HarvardNet would require the rates for line sharing, even during the interim period, ultimately to be set through the section 252 negotiation and arbitration process. Specifically, in their October 8 *Ex Parte*, NorthPoint and HarvardNet suggested that the Commission establish principles for setting maximum interim rates for line sharing, consistent with the principles that state commissions would apply if the parties are unable to reach agreement through the negotiation process. NorthPoint and HarvardNet further suggested that the Commission could make these rates subject to a true-up at the conclusion of the section 252 process. That is, the incumbent LEC would be entitled to recoupment or the DSL competitive LEC would be entitled to a refund for rates paid during the interim period, based on the rate ultimately set either by the parties in negotiation or the state commission in an arbitration. This approach would both enable the prompt commencement of DSL competition to serve residential customers as well as ensure that the specific charges paid by DSL competitive LECs for line sharing would be established through the section 252 process. Indeed, U S West essentially concedes that such a true-up process protects incumbent LECs against the risk that an interim rate would amount to an unconstitutional taking.[11] Similarly, a true-up procedure would

7 *See* Written Ex Parte Communication of NorthPoint Communications, Inc. and HarvardNet, Inc., CC Dkt. No. 98-147, at 4 (October 8, 1999) (October 8 *Ex Parte*).

8 *See* Comments of the State of California and the Public Utilities Commission of California, ccDkt. No. 98-147, at 8 (June 15, 1999); Comments of the Oklahoma Corporation Commission, CC Dkt. No. 98-147, at 19 (June 15, 1999).

9 *See* U S West Letter at 2; SBC Letter at 2.

10 *Competitive Telecommunications Ass'n v. FCC,* 117 F.3d 1068, 1073-74 (8th Cir. 1997), *affirming in part* Local Competition First Report and Order, 11 FCC Rcd 15499 (1996).

11 *See* U S West Letter at 3.

protect DSL competitive LECs against the risk that the interim rates set by an incumbent LEC are too high. Further, the procedure outlined by NorthPoint and HarvardNet preserves the integrity of the section 252 process.

The October 8 *Ex Parte*, in addition, proposed "surrogate line sharing" as a temporary means of bringing residential DSL competition to markets where incumbent LECs allege that they are unable to provide line sharing to DSL competitive LECs on a timely basis. Under this approach, non-compliant incumbent LECs would be required to offer access to separate loops for DSL service at a very significant discount from the unbundled loop price until such time as the incumbent was able to offer line sharing to competitive LECs pursuant to FCC requirements. During this period, such incumbent LECs also would be prohibited from offering line sharing to new customers. The point of this approach is obviously not to create a new, permanent unbundled network element known as surrogate line sharing. Rather, as stated in the October 8 submission, the objective is to ameliorate the current anticompetitive conditions in the residential DSL market until an incumbent LEC is able to offer access to line sharing to competitive LECs. Surrogate line sharing would eliminate the incumbent LEC's ability and incentive to be the exclusive provider of DSL over a shared line, because it would require both incumbent and competitive LECs to provide service to new customers over a separate loop. In addition, it would enable residential consumers, for the first time, to benefit from head-to-head DSL competition on a level playing field.

In short, surrogate line sharing, as proposed by NorthPoint and HarvardNet, does not involve the exercise of the Commission's authority under section 251 to require access to a new unbundled network element. Rather, the approach would involve the exercise of the Commission's authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[12] In this case, the record in this proceeding fully supports a finding that interim remedial relief of is needed to address the current absence of competition in the residential DSL marketplace until the current dominant provider, the incumbent LEC, is able to offer line sharing to DSL competitive LECs. As noted above, the Commission is entitled to "substantial deference by courts" when it fashions a temporary remedy.

In addition to their jurisdictional claims, U S West and SBC also contend that the specific pricing principles advocated by the DSL competitive LECs are unreasonable. For example, NorthPoint and Harvard.Net suggested in their October 8 *Ex Parte* that the Commission could reasonably use the allocation used by the incumbent LECs in setting prices for their DSL offerings over shared lines as a reliable benchmark for determining the loop cost that should be allocated to line sharing.[13] U S West appears to argue that the use of an incumbent LEC's allocation of loop costs for its special access service is unreasonable because: 1) an incumbent LEC will incur other costs to provide line sharing to DSL competitive LECs that are not incurred when an incumbent offers line sharing as

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12 47 U.S.C. § 201(b).

13 *See* October 8 *Ex Parte* at 4.

a retail service; and 2) tying the allocation of loop costs for an unbundled network element to an incumbent's allocation of loop costs for its interstate special access line sharing service amounts to an imputation requirement.[14]

NorthPoint and HarvardNet addressed in their October 8 *Ex Parte* the issue of the incremental costs that an incumbent LEC may incur to provide line sharing to DSL competitive LECs. Although NorthPoint and HarvardNet recognized that an incumbent LEC may incur such costs, the evidence to date in the record indicates that those costs are likely to be quite small (e.g. access to a splitter) and certainly not of the magnitude alleged by the incumbent LECs. The point of using the incumbent LEC's allocation of loop costs was to provide an efficient and reliable measure for state commissions to use to determine the loop portion of the line sharing price in resolving arbitrations before them.

Moreover, NorthPoint and HarvardNet did not base their use of the incumbent LEC's allocation method on an imputation theory. Rather, they pointed out that the Commission's current pricing rules for special access require incumbent LECs to set the recurring prices for new interstate special access services at a level that is no less than the "direct costs" of providing that service, which are comparable to incremental costs.[15] NorthPoint and HarvardNet further observed that in light of the potential or actual availability of high speed Internet access service from other providers, such as cable television operators, it is reasonable to assume that market forces would tend to put pressure on the incumbent LECs to move the prices for their DSL offerings toward long run incremental costs. Hence, in these circumstances, it is entirely reasonable for the Commission to use the incumbent LECs' allocation of loop costs to its DSL special access service provided over a shared line as the benchmark for allocating loop costs to a shared line unbundled network element.

Incumbent LECs may also contend that the NorthPoint/HarvardNet "surrogate line sharing" proposal is inherently confiscatory because it requires an incumbent LEC to make access to an unbundled loop available at a significant discount from the price established for that element. The test for confiscation, however, is not whether a carrier earns a reasonable return on every service or facility that it offers. Rather, the test is whether the "total effect" of a particular ratemaking scheme can be said to be confiscatory.[16] As this Commission previously noted in assessing incumbent LEC confiscation arguments, "incumbent LECs' overall rates must be considered, including revenues for other services under our jurisdiction."[17] Applying this standard, it is clear

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14 *See* U S West Letter at 3.

15 *See Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking (FCC 99-206), CC Dkt. No. 96-262 at para. 35 (Aug. 27, 1999); 47 C.F.R. 361.49(f)(2).

16 *See FPC v. Hope Natural Gas*, 320 U.S. 591, 602 (1944).

17 Local Competition First Report and Order, 11 FCC Rcd 15499, at para. 737 (1996).

that the NorthPoint/Harvard Net interim "surrogate line sharing" proposal is not confiscatory.

More fundamentally, requiring incumbent LECs to offer surrogate line sharing on an interim basis at a discounted rate does not involve "ratemaking" in the sense in which that term is typically used by regulatory bodies. Rather, it is tool to promote the development of competition in a market where the incumbent monopolist continues to possess significant advantages that hamper competitive entry. Indeed, the Commission in the past has used discounts from existing rates to offset competitive advantages of dominant carriers. When the FCC adopted its system of interstate access charges, for example, it ordered incumbent LECs temporarily to provide switched access services to MCI and other non-dominant carriers at a 55 percent discount from the rates paid by AT&T. The Commission reasoned that the substantial discount was needed to offset the superior access service that was only available to AT&T. [18] Similarly, in the case of line sharing, making access to an unbundled loop available to DSL competitive LECs (and the incumbent LEC) at a substantial discount is necessary to offset the marketplace advantage that an incumbent otherwise would have. Further, this interim remedy would strengthen an incumbent LEC's incentive to offer line sharing as an unbundled netowrk element expeditiously.

We have shown above that the objections to the pricing principles and interim line sharing arrangements advocated by DSL competitive LECs are without merit. Rather, the proposed measures represent a reasonable exercise of the Commission's broad authority under the Act in the interest of accelerating the development of residential competition for DSL service. In this case, the interim line sharing and surrogate line sharing proposals present an opportunity for the Commission to demonstrate to residential consumers that the pro-competitive provisions of the Act can deliver concrete benefits to them.

Respectfully submitted,

Michael E. Olsen
Deputy General Counsel
NorthPoint Communications, Inc.

Melanie Haratunian
General Counsel/Director of Regulatory Affairs
HarvardNet, Inc.

cc: Carol Mattey
Jane Jackson
Howard Shelanski
Pat DeGraba
David Hunt
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[18] *See MTS WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C. 2d 834, 862 (1984).

USWEST

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Melissa Newman
Vice President – Federal Regulatory

October 15, 1999

Ex Parte Communication

Mr. Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Covad's Line-Sharing Proposal

Dear Mr. Strickling:

This letter responds to Covad's proposal of September 30, 1999 regarding the Commission's possible implementation of a line-sharing requirement. As more fully explained in U S WEST's comments and ex parte submissions, U S WEST believes that a line-sharing requirement is both unnecessary and unlawful. Data CLECs that choose not to provide voice services — either on their own, through circuit-switched or voice-over-DSL technology, or in tandem with another carrier — do not suffer any discrimination. They are free to take an unbundled loop and provide multiple services over it, just as incumbent LECs do when they provide voice services and DSL over a single loop. For the same reason, data CLECs are not "impaired" by the unavailability of a data-frequency UNE within the meaning of section 251(d)(2)(B).

If the Commission nevertheless requires line sharing, it should certainly not adopt Covad's implementation proposal. That plan is deeply flawed in several respects. As an initial matter, accepting Covad's invitation to set an interim price for an unbundled data channel — whether at 10% of the cost of an unbundled loop or any other level — would require the Commission to exceed its statutory jurisdiction. Covad asserts that sections 251(c) and 252 of the Act give the Commission the requisite pricing authority. But the Act in fact provides that "*a State commission*" must determine "the just and reasonable rate for network elements . . . based on the cost . . . of providing the . . . network element." 47 U.S.C. § 252(d)(1) (emphasis added). The Commission has authority to prescribe a "pricing methodology" for such state pricing decisions. *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 732 (1999). But "[i]t is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances." *Id.*

This distinction between prescribing a general methodology and establishing the price of a particular UNE applies to interim and permanent rates alike. Indeed, the Commission's recent brief in the UNE Remand proceeding before the Eighth Circuit took the position that the Commission may adopt "default proxies" that "provid[e] the states with guidance as to how to deal with a difficult interim problem," but may not "adopt[] final, binding rules" that establish rates. Brief for Respondents at 77, *Iowa Utils. Bd. v. FCC*, No. 96-3321 (8th Cir. filed Aug. 16, 1999). Covad's proposal that the Commission establish an interim price for an unbundled data channel is therefore jurisdictionally barred. In any event, there is no need for the Commission to adopt an interim pricing methodology for line sharing, because state commissions will have ample time to address pricing issues over the course of the year or so that it will take for incumbent LECs to make the necessary OSS and network modifications.

Even if the Commission were to adopt only a default proxy, as opposed to a binding price for a data-channel UNE, it would unduly constrain the negotiation process required under section 252, and therefore violate the Act. Creating a presumptive price ceiling would remove any incentive for CLECs to consider a higher price. A default proxy likewise might serve as a de facto floor that would prevent incumbents from accepting a lower price in exchange for other benefits. Foreclosing the give and take contemplated by Congress would inevitably cause the parties simply to wait for the default proxy price to be imposed by the arbitrator.

Covad's pricing proposal also is substantively flawed. Under the Act, UNE prices must be "based on the cost" of the network element in question and "determined without reference to a rate-of-return or other rate-based proceeding." 47 U.S.C. § 252(d)(1)(A)(i). Moreover, because a line-sharing requirement would necessarily effect a taking of an incumbent LEC's property, any pricing methodology for a data-channel UNE must ensure that the incumbent receives just compensation for the value of that property. *See, e.g., Gulf Power Co. v. United States*, No. 98-2403, 1999 WL 699763 (11th Cir. Sept. 9, 1999). Covad ignores these statutory and constitutional standards in pushing for a 90% discount off the cost of an unbundled loop as an interim price for a data-channel UNE.

Covad asserts that the price of a data-channel UNE should be nominal because "the incumbent LECs have identified the costs for DSL line sharing [in their interstate tariffs] as at or near zero." Ex Parte Letter of Thomas Koutsky and Jason Oxman to Lawrence Strickling, dated Sept. 30, 1999, at 4. But incumbents' allocations of common costs to their own DSL services have no bearing on the actual "costs for DSL line sharing." Indeed, incumbent LECs offer a variety of services over local loops, and they price some services below cost and others above cost (often pursuant to regulatory mandate). In the patchwork system of federal and state mandates, and regulated and unregulated prices, there simply is no direct correlation between the price of a particular service and the cost of the relevant loop functionality.

Covad suggests that any difference between incumbents' imputation of loop costs in their DSL prices and the rate for a data-channel UNE would violate the nondiscrimination requirement in sections 251 and 252. But the Commission made clear in the initial *Local Competition Order* that, "[w]here costs differ, rate differences that accurately reflect those differences are not discriminatory." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15928 ¶ 860 (1996). And providing an unbundled data channel to competitors would impose significant costs that incumbents would not otherwise incur. For example, an incumbent LEC would be required to replace any POTS splitter that is integrated in the incumbent's DSLAM with a stand-alone splitter, as well as to make expensive OSS modifications. These costs and others — which are expected to amount to millions of dollars for each incumbent LEC, *see, e.g.*, Line Sharing Reply Comments of U S WEST Communications, Inc. at 27; Line Sharing Comments of GTE at 28-29 — are elements of the cost of any data-channel UNE defined by the Commission.

It is equally clear that there is nothing in the Act that requires that section 252(d)(1)(A) costs be imputed into an incumbent LEC's own services. Such action would require repricing all local exchange and other loop-based services at TELRIC-based rates. Regardless of whether such action would be desirable, or lawful, it is clear that the Commission is not planning to implement such an approach. Covad's implicit premise — that it is entitled to have U S WEST impute TELRIC costs into all of its own local services — is simply wrong.

Moreover, Covad's interim pricing proposal does not even purport to represent an estimate of the actual cost of a data-channel UNE. Instead, Covad asserts that "10% of the UNE loop rate . . . seems a reasonable compromise among the wide variety of cost proposals contained in the record." Ex Parte Letter of Thomas Koutsky and Jason Oxman to Lawrence Strickling, dated Sept. 30, 1999, at 4. Picking a number out of a hat would represent the height of arbitrary decisionmaking. It also would abdicate the Commission's obligation to afford constitutionally sufficient compensation. Notably, as the Eleventh Circuit recently held, reviewing courts are charged with the responsibility of conducting a searching review of the constitutional adequacy of Commission orders that purport to provide just compensation. *See Gulf Power*, 1999 WL 699763, at *11-12. If the Commission nevertheless were to adopt a proxy that is not demonstrably tied to the value of a data-channel UNE, it should direct states to establish a true-up mechanism under which CLECs would be required to make up the difference between a constitutionally sufficient price for a data-channel UNE — whatever it is ultimately determined to be — and the interim proxy established by the Commission. Otherwise, incumbent LECs could be forced to incur irreparable losses during the interim period.

U S WEST believes that, if the Commission sets an interim pricing guideline, it should provide that CLECs must pay, at a minimum, 50% of the cost of an unbundled loop for a data-channel UNE. As economists such as Alfred Kahn have noted, the incremental costs of an unbundled data channel *and* a voice channel in a line-sharing environment are *the same. See* Line Sharing Comments of Bell Atlantic at Exh. C, Reply Declaration of Alfred Kahn, ¶ 17. A sensible, pre-true-up allocation of common loop costs therefore would be to assign the voice and data carriers 50% each. While such a percentage-based figure cannot substitute for an actual determination of just compensation under the Fifth Amendment — a determination that must be made in setting any permanent price — that figure at least has an articulable rationale. By contrast, Covad's 10% proposal has no logical basis.[1/]

Another serious problem with Covad's plan is the proposed implementation schedule. Covad suggests that incumbent LECs should have 30 days to submit interim rates, terms, and conditions in the form of an amendment to interconnection agreements, and should have to begin providing line sharing within 10 days of a CLEC's execution of such an amended agreement. A 40-day window for implementation would be woefully inadequate. As U S WEST and other incumbent LECs have stated in their comments and in ex parte presentations, it would take approximately one year to implement a line-sharing requirement. Incumbent LECs would have to redesign several key operating systems relating to order processing, provisioning, repairs, and billing. *See* U S WEST Ex Parte Presentation, dated Oct. 7, 1999. They also would have to modify their networks, for example by substituting stand-alone POTS splitters for splitters that are integrated in the incumbent's DSLAM. *See id.* These tasks cannot possibly be completed within several months, much less 40 days. The Commission obviously should not impose a rule that cannot be followed.

[1/] It may well be that 50% of the TELRIC rate for a loop would not satisfy the constitutional requirement of just compensation for the taking of an unbundled data channel. So long as the Commission's pricing guideline explicitly recognized incumbents' right to seek additional compensation, however, a 50% allocation at least would represent a presumptively valid application of section 252(d)(1).

Because it is so unrealistic, Covad's proposal would inevitably result in noncompliance by incumbent LECs. Covad or other CLECs might then demand unbundled loops — rather than a data-channel UNE — at a 90% or other deep discount. By obtaining whole loops, Covad could provide any variety of DSL — including the SDSL technology it has widely deployed in its network — as well as packetized voice service. A data-channel UNE, by contrast, could be used only in the provision of ADSL service. The Commission should reject any such attempt by CLECs to use the line-sharing proceeding to obtain access to unbundled loops at nominal rates.

As U S WEST has noted in other filings, any price established for line sharing must apply only in situations where a loop is actually shared. Where a CLEC alone is providing services over an unbundled loop, any pricing methodology that the Commission adopts for a data-channel UNE would be irrelevant. The Commission should make this point explicitly if it adopts any interim pricing guideline for a data-channel UNE.

Please do not hesitate to contact me if I can be of any further assistance in this matter.

Sincerely,

Melissa Newman
Vice President – Federal Regulatory

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October 13, 1999

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By Hand

Magalie Roman Salas, Secretary
Federal Communications Commission
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Washington, DC 20554

Re: CC Dkt. No. 98-147 (Line Sharing)
Ex Parte Communication

Dear Ms. Salas:

This letter, on behalf of Network Access Solutions ("NAS"), responds to certain arguments that US West makes with regard to line sharing in its October 7, 1999 *ex parte* filing in this proceeding.

First, the Commission should not adopt US West's proposal to permit ILECs to price the "shared loop digital signal UNE" (*i.e.*, those frequencies on a shared loop on which DSL service is provided) in a discriminatory way. In its letter, US West asks that the FCC require a CLEC using a shared loop digital signal UNE to pay a price for that UNE equal to 50 percent of the full loop UNE price, while permitting an ILEC using a shared loop digital signal UNE to pay nothing for that UNE (*i.e.*, to attribute *no* loop costs to the ILEC's DSL service). Adopting US West's proposal would be unlawful under Section 251(c)(3) of the Act. That provision requires that UNEs be provided on terms that are nondiscriminatory. On its face, the pricing rule that US West proposes would be discriminatory by requiring a CLEC to pay a substantial sum for use of a facility for providing DSL service that US West, in its role as a competitor of the CLEC, would be permitted to use free of charge. Adoption of US West's proposed pricing policy also would violate the public interest even if it were not unlawful since it would prevent the development of competition in the residential DSL market by giving ILECs a huge cost advantage in marketing DSL service to residential customers. This cost advantage would amount to more than $7.00 per line per month on average (*i.e.*, 50% of the average price of a loop UNE). This is a substantial percentage of the total monthly cost to provide DSL service over a given line.

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Rather than adopt a policy that permits an ILEC to provide the shared loop digital signal UNE to CLECs at a higher price than it provides that UNE to itself, the FCC instead should require an ILEC to provide the UNE at the same price to both CLECs and itself. The Commission should permit an ILEC to set the price of that loop UNE at whatever amount the ILEC desires, subject only to the requirement that the ILEC attribute that same amount to its own DSL service as numerous commenters have recommended.

Second, the Commission should reject US West's proposal to permit an ILEC to provide data splitter functionality to CLECs for the provision of DSL service at a higher price than it provides that functionality to itself. In its letter, US West proposes to charge CLECs an amount for data splitter functionality that consists of a non-recurring charge of almost $90 per line plus an additional unspecified monthly recurring charge for rent, power use, HVAC use and racking, while exempting its own DSL service from bearing comparable data splitter costs. For the same reasons that US West's proposed pricing proposal for the shared loop digital signal UNE is both unlawful under Section 251(c)(3) and contrary to the public interest, its proposal to permit an ILEC to provide data splitter functionality at discriminatory prices likewise would be both unlawful and contrary to the public interest.

Rather than adopt a policy that permits an ILEC to provide data splitter functionality to CLECs at a higher price than the ILEC provides that functionality to itself, the FCC instead should require an ILEC to provide that functionality to CLECs and to itself at the same price. The agency should implement this non-discrimination policy in the manner that NAS proposed in its October 8, 1999, *ex parte* letter in this proceeding.

Third, the Commission should reject US West's proposal to delay the onset of mandatory line sharing until after T1E1 finalizes the existing line sharing technical standard sometime in the middle of next year. Permitting an ILEC to share a loop only with itself until the existing T1E1 standard becomes final not only would be patently discriminatory, it also would be contrary to the public interest by permitting the ILEC to further entrench its monopoly in the residential DSL market.

Fourth, the Commission should not delay the start of mandatory line sharing until a technical test of line sharing is conducted as US West recommends. Under the US West proposal, the FCC would delay the onset of line sharing until after ILECs determine in a series of tests that a wide variety of DSL technologies would not cause interference to existing ILEC services. But there is no need to conduct such testing if the Commission limits the DSL technologies that can be transmitted over a shared line to those that the ILEC itself uses over a shared line and those, such as ADSL, for which a technical standard governing use over a shared line already have been developed, as numerous commenters have suggested.

Finally, the Commission should reject US West's last ditch effort to replace line sharing with a heretofore undiscussed plan that US West refers to in its October 7 letter as "virtual line sharing." Even if virtual line sharing allowed a CLEC to compete with an ILEC's DSL offering on *price*, it still would not give the CLEC a fair opportunity to compete since it would require the CLEC to sell exchange service to a given customer as a condition precedent to the sale of DSL service to that customer. The record in this proceeding makes clear that a CLEC cannot compete effectively with ILECs in the residential DSL market if the CLEC must sell a given customer exchange service as a condition precedent to selling that customer the CLEC's DSL service.

Respectfully submitted,

Rodney L. Joyce
Counsel for Network Access Solutions Corp.

cc: Larry Strickling (CCB, Rm. 5-C450) (by hand)
Carol Mattey (CCB, Rm. 5-B125) (by hand)
Jane Jackson (CCB, Rm. 5-A225) (by hand)
Howard Shelanski (OPP, Rm. 7-C452) (by hand)
Pat DeGraba (OPP, Rm. 7-C314) (by hand)
David Hunt (CCB, Rm. 5-A340) (by hand)
Stani Pies (CCB, Rm. 5-C360) (by hand)
Vincent Paladini (CCB, Rm. 6-A236) (by hand)
Margaret Egler (CCB, Rm. 5-C100) (by hand)
Don Stockdale (CCB, Rm. 5-C354) (by hand)

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13 October 1999

Ex parte letter

Re: Response to U S WEST line sharing proposal
In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147

Ms. Carol Mattey, Chief
Common Carrier Bureau
Policy and Program Planning Division
445 12th Street, S.W.
Washington, D.C. 20554

Dear Ms. Mattey:

Covad Communications is pleased to have the opportunity to respond to U S WEST's October 7, 1999, *ex parte* presentation in which it proposed what it termed a "workable solution" to the line sharing pricing issue. U S WEST defends its imputation of zero loop cost to its own retail xDSL offerings as a "technological efficiency" that justifies its discriminatory treatment of competitors seeking that same funcationality.[1] A century-old monopoly of local loop plant that Congress has required the FCC to break is not a "technical efficiency." U S WEST's arguments must be viewed for what they really are: a continuation of a three year incumbent LEC tradition of fighting each and every pro-competitive, market opening proceeding undertaken by the Commission. In this letter, we highlight the discriminatory and competition-blocking characteristics of U S WEST's proposal. We also offer a recent order of the Minnesota Commission in support of Covad's argument concerning the nondiscrimination justification for its pricing proposal.

First, U S WEST appears to concede that line sharing is necessary, but warns that competitive LECs are using line sharing as a trick to avoid high loop costs. Although U S WEST is correct to highlight the inordinately high loop rates it charges competitors, Covad and other competitive LECs are seeking nothing more than parity with the incumbent. Covad has argued consistently that the statutory requirement that incumbent LECs provide "nondiscriminatory access" to unbundled network elements (section 251(c)(3) of the Act) obligates incumbents to provide requesting carriers with access to line sharing capability – the very same line sharing that U S WEST's local

[1] *See* U S WEST October 7, 1999, *ex parte* at 3.

telecommunications operation provides to its own "Megabit" retail xDSL service. It is not surprising that U S WEST wants to provide line sharing only to itself: U S WEST is currently arguing before the FCC and the courts that advanced telecommunications companies like Covad are not entitled to *any* UNEs, to collocation space, or any of the other market-opening provisions of the 1996 Act, because xDSL services are not local telephone services.[2] To hear U S WEST tell it, Congress intended to open only the local circuit-switched voice market to competition, despite the clear mandate in section 251(c)(3) that incumbents provide UNEs to competitors seeking to provide any "telecommunications service." Given U S WESTs unequivocal opposition to local competition, their posture in this proceeding in opposition to line sharing is not surprising.

Pricing

Perhaps sensing that the Commission will not respond favorably to its attempts to block line sharing outright, U S WEST is now attempting to erect as many administrative barriers to rapid implementation of line sharing as possible. If it succeeds in miring line sharing in months or even years of arbitration, U S WEST has won. But despite U S WEST's contention, pricing issues can be handled on an interim basis based on the pricing mechanisms that U S WEST itself has already put in place. In its October 8, 1999, order adopting line sharing requirements for U S WEST, the Minnesota Commission ordered U S WEST to set its line sharing pricing "guided by the principle that USWC [U S WEST Corporation] should provide line sharing to the CLECs on the same terms and conditions (including pricing, processes, and services) that it provides to itself." (Minnesota Commission order at 2 (*see attached*).) The Minnesota Commission concluded that "by forcing CLECs to purchase individual unbundled loops, while ILECs impute $0 to the loop for their own DSL services, the ILEC is discriminating against CLECs. CLECs should have access to the data spectrum at the same rate ILECs charge themselves, be that $0 or otherwise." (*Id.* at 1.) As Covad has consistently argued before the FCC, and as the Minnesota Commission has ordered, this is exactly the nondiscriminatory requirement imposed on incumbent LECs by the 1996 Act. In fact, the Minnesota Commission ordered U S WEST to utilize this pricing mechanism in advance of its final line sharing order, because it saw "no reason why it should delay advancing competition in Minnesota . . . ." (*Id.* at 3.)

In its September 30, 1999, *ex parte* letter, Covad proposed a simple and workable interim line sharing mechanism that would ensure that incumbent LECs do not delay providing line sharing to competitors while they continue to provide it to themselves. In

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[2] *See, e.g.* Comments of U S WEST, Inc., CC Docket Nos. 98-11, 98026, 98-32, 98-78, 98-91, 98-147, at 3 ("the Commission should recognize that the requirements of sections 251(b) and (c) do not apply to a telephone company's provision of advanced services, even if that company also acts as a local exchange carrier in other contexts") (filed Sept. 24, 1999). As further evidence of its distorted view of competition, U S WEST suggests that "the inapplicability of sections 251(b) and (c) to the provision of advanced services is consistent with the procompetitive purposes of the Act." *Id.* at 4. It is impossible to imagine that the same Congress that enacted section 706 as an express mandate to encourage deployment of advanced services would have exempted advanced services from the core market opening provisions of the Act.

broadband "Internet time," the ability of incumbent LECs to lock up the nascent market by barring competitors, even for a few months, from accessing the UNEs to which they are entitled by law, will mean the difference between monopoly and competition in broadband services. The true consumer benefit of xDSL is that consumers can talk on the phone and surf the Internet at the same time over a single loop --- but today, incumbent LECs ensure that only they, not data CLECs, provide that service. Even if the Commission orders line sharing as a UNE, such action will be meaningless without immediate implementation pursuant to concrete and enforceable terms and conditions.

U S WEST contends that Covad's proposal, that U S WEST offer line sharing as a UNE to Covad and other competitive LECs pursuant to the same terms and conditions that it offers line sharing to itself, "does not work" because "no facts or analysis support it." The support Covad has consistently offered is the 1996 Act, which requires incumbent LECs to provide nondiscriminatory access to UNEs. U S WEST argues that it should be permitted to charge itself nothing for an xDSL loop while it charges competitive LECs 50% of the loop cost – and that this is merely a "technical efficiency." With U S WEST loop rates of 38 dollars in Idaho, for example, 50% of the loop cost – 19 dollars – is exactly 95 cents less than the *retail price* U S WEST charges for its baseline xDSL consumer service. Faced with tens of thousands of dollars in collocations costs, as well as its own marketing and operating costs, no data CLEC can even begin to compete. U S WEST's "technical efficiency" argument is yet another in a long series of efforts to leverage its local loop monopoly into the broadband market. This is clear discrimination and the 1996 Act does not permit it.

By its proposal, U S WEST is seeking to recover 150% of its costs for each loop – 100% from its voice customer and a bonus 50% from the data CLEC. As the Minnesota Commission concluded in its line sharing order, "[i]f USWC were permitted to impose rates for loop sharing that are above incremental cost, their compensation for a loop would constitute double recovery. If data CLECs were forced to pay an additional cost for the data portion of the same loop, USWC would receive a windfall and the consumers would overpay for their services." (*Id.* at 5.) Covad's proposal in its September 30, 1999, *ex parte* is a reasonable, and indeed generous, price formula. It would permit U S WEST and other incumbent LECs a 10% *additional* profit, above and beyond its zero costs, for every line sharing UNE it sells.

To the extent additional pricing issues must be resolved in the near future, the Commission has recently put the mechanisms in place to handle those issues. Last week, the Commission announced the formation of a Federal-State Joint Conference on Advanced Telecommunications Services.[3] This Joint Conference will handle issues related to the deployment of advanced services that require the close cooperation of federal and state regulators. As U S WEST points out in its *ex parte*, line sharing pricing issues should be resolved in the long term so as to take account of complex issues of local exchange service pricing and access charges. The Joint Conference is the perfect venue for resolution of these issues. As the Minnesota Commission concluded, however, "the

[3] *See* Federal-State Joint Conference on Advanced Telecommunications Services, FCC 99-293, CC Docket No. 99-294 (rel. Oct. 8, 1999).

pricing issue is not a substantial impediment to ordering line sharing."[4] The FCC should not be distracted by U S WEST's attempt to derail line sharing because issues need to be resolved in the future. U S WEST has pulled out every argument it can think of – from destruction of the network to the creation of a hybrid Internet telephony goldmine for CLECs[5] – to block line sharing and preserve its monopoly. As Covad has repeatedly argued, line sharing is crucial for competition in the broadband marketplace, and the Commission must act rapidly to ensure that U S WEST and other incumbents do not succeed in blocking competitors from entering their markets.

Please do not hesitate to contact me if I can be of any further assistance in this matter. I have attached a copy of the Minnesota line sharing order for your reference.

Sincerely,

Jason Oxman
Senior Government Affairs Counsel
Covad Communications

cc:
Lawrence Strickling, CCB
Robert Atkinson, CCB
Staci Pies, CCB
Jake Jennings, CCB
Margaret Egler, CCB
Vincent Paladini, CCB
Christopher Libertelli, CCB
Dorothy Attwood, Office of Chairman Kennard
Sarah Whitesell, Office of Commissioner Tristani
Kyle Dixon, Office of Commissioner Powell
Linda Kinney, Office of Commissioner Ness
Rebecca Beynon, Office of Commissioner Furchtgott-Roth

[4] *See* Minnesota Order at 5.

[5] Having failed to convince the FCC that line sharing will bring down the public switched network (an argument recycled, no doubt, from the *Hush-a-phone* days when the incumbent telephone company argued before the FCC that a plastic cup attached to a telephone handset with a rubber band threatened the future of the network), U S WEST attempts in its *ex parte* to argue that line sharing is a means for data LECs to avoid investing in "a more robust network" until they can deploy IP telephony within "9 to 18 months" and avoid the expense of circuit-switched voice service. U S WEST October 7, 1999, *ex parte* at 5. Covad has no plans to deploy IP telephony and is not advocating line sharing in order to "force ILECs to inflate their prices for data retail services." *Id.* Line sharing is not a deceptive means of sneaking IP telephony capability into the network. All Covad seeks is parity with the incumbent.

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October 8, 1999

Ex Parte Communication

Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

DEAR MR. STRICKLING:

Re: SBC Response To Covad Ex Parte On Implementation Of Line Sharing

This letter is submitted by SBC Communications Inc. (SBC) is response to Covad's September 30, 1999 *ex parte* on Covad's proposed implementation of line sharing. Covad proposes that the Bureau establish an interim price for line sharing and that the price be 90% off the UNE loop price determined by the State in which line sharing is to be offered. Covad proposes that incumbent Local Exchange Carriers (ILECs) be required to submit to the Common Carrier Bureau and to Competitive Local Exchange Carriers (CLECs) interim amendments to their Interconnection Agreements within 30 days of the release of the Commission's order adopting line sharing requirements. Covad further proposes that such interim amendments obligate ILECs to provision fully operational line sharing capability to CLECs within 10 days of the date when the CLEC signs the amendment. Covad also proposes that the rates, terms, and conditions (presumably for line sharing) be made the subject of federal tariffing. Covad asserts that the Commission has authority to make these requirements under Sections 4(i), 201(b), and 251(c)(3) of the 1934 Communications Act, as amended (hereafter "the Act"). 47 U.S.C. § 151 *et seq.*

Although Covad implies otherwise, its *ex parte* is in actuality a request for a new rulemaking and the relief it seeks cannot be granted absent full compliance with the Commission's administrative rules and the procedures set forth in the Administrative Procedure Act. 47 CFR § 1.401; 5 U.S.C. § 553 *et seq.* Covad's request also assumes a result – namely, required line sharing – that has yet to be ordered. Thus, Covad's request is not only procedurally defective, it is presumptuous and premature.[1]

[1] Covad does not say so, but its request appears to be founded on the Further Notice of Proposed Rulemaking (FNPRM) in CC Docket No. 98-147. However, nowhere in that FNPRM does the Commission propose requiring amendments to ILEC Interconnection Agreements. Nor has the Commission in that FNPRM requested line sharing cost studies or proposed setting a line sharing proxy or line sharing specific rate. In fact, in that FNPRM, the Commission has yet to even officially adopt line sharing as a national policy. As such, Covad's proposals in its *ex parte* are beyond the scope of the FNPRM and adopting its proposals would require another rulemaking.

Worse yet, the relief which Covad seeks is beyond the Commission's authority and is inconsistent with the Act. Section 252 of the Act clearly contemplates that interconnection agreements will be reached through voluntary negotiations and/or through State arbitrations. 47 U.S.C. § 252(a)(1) and (b)(1). Also, Section 252(c)(2) gives the State commissions the authority to determine the rates for interconnection and for network elements. While it is true that, in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), the Supreme Court determined the Commission had authority to design a pricing methodology, it also recognized that, under Section 252(c)(2) and Section 252(d)(1), only the State commissions can establish specific rates.

The State commissions have already established the rates for UNE loops and, unless the parties in negotiations agree otherwise, only the State commissions can alter or change those rates. Moreover, it is not for this Commission but for the federal district courts to review the validity of those State determinations. Indeed, were it not so, Section 252 would be virtually meaningless because a federal Commission-prescribed rate would circumvent the purpose of the twin cornerstones of Section 252 of the Act – namely, private interconnection negotiations and state arbitrations.[2]

Adoption of Covad's proposed 90% discount from State determined UNE loop rates is not only beyond the lawful authority of this Commission, it is also without support. Nothing in the record of CC Docket No. 98-147 supports the approval of any specific line sharing proxy or line sharing rate. As stated in SBC's initial comments in that docket, the costs of implementing multi-carrier line sharing "are not yet known or quantifiable" and could well exceed the cost of a UNE loop. (SBC, pp. 17, 22 & n. 17). Covad's argument that loop costs were not included in the ILECs' cost studies provides no support for a 90% discount because the ILECs recover the loop costs in the rates charged for other services, as could Covad or any other CLEC. It is absurd for Covad or anyone else to suggest that loop costs are or should be at or close to zero.[3]

Covad's proposal that ILECs be required to submit to the Bureau and the CLECs interim amendments to their Interconnection Agreements within 30 days of the release of the Commission's line sharing order is likewise unlawful. The Act clearly provides that all interconnection agreements (be they negotiated or arbitrated) are to be submitted to the State commissions for approval and that only the State commissions can approve or reject those agreements. 47 U.S.C. § 252(e). Consequently, submitting amendments to the Bureau would be a meaningless gesture since the Bureau has no authority under the law to reject or approve them.

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[2] Adopting a federal rate, even on an interim basis, would unfairly influence the results which Congress intended to be achieved through private negotiations and in State arbitrations since the federal proxy or rate would become a benchmark beyond which the CLECs and possibly the State commissions would not go. The proxies established in CC Docket 96-98 and rates adopted in subsequent State arbitrations provide compelling evidence of that influencing role. That result would be particularly unfair in this instance, since Covad's proposed rate has no cost support and none of the supporting detail required in State arbitration proceedings.

[3] As part of the SBC/Ameritech merger conditions, a surrogate interim line sharing charge of 50% of the monthly UNE recurring loop rate will be made available to CLECs who only use those lines to provide data services and the same rate is also made payable by the SBC/Ameritech advanced services affiliate. That condition implicitly recognizes that loop costs for advanced services are not zero and that it is appropriate for the SBC/Ameritech advanced services affiliate to pay a surrogate interim line sharing charge. CC Docket No. 98-141.

Covad's proposal that ILECs be obligated to provision fully operational line sharing capability to CLECs within 10 days of the date when the CLEC signs the amendment asks for the impossible. Currently, ILECs have no ability to provision multi-carrier line sharing. There are currently no line sharing standards and no vendor equipment which would permit such sharing. As SBC pointed out in its initial comments in CC Docket 98-147, multi-carrier line sharing is not an existing capability and getting there will require the development of standards and equipment, upgrades to systems, and the implementation process will take one and a half to two years time. (SBC, pp. 20-22). In addition, Covad's proposal fails to recognize that, even then, line sharing will only work with ADSL and then only on certain lines. (SBC, p. 25). In other words, Covad is asking that the ILECs be immediately required to provide a line sharing UNE which does not exist, may not exist for some time, and which may never be technically feasible for some services (*e.g.*, IDSL, SDSL, and HDSL) and lines.

Covad's proposal that the rates, terms, and conditions of line sharing be made subject to federal tariffing is also unreasonable and unworkable. Loop costs – be they bundled or unbundled – clearly are going to vary by state and are not going to be amenable to any kind of uniform or federally-mandated tariffing. Similarly, nonrecurring charges for loop conditioning are going to vary by line and by the number of load coils or bridge taps that must be removed. In fact, it is precisely because of these variances that Congress, and previously this Commission, have left such matters for determination by the States.

Finally, SBC disputes Covad's claim that Covad's proposals are necessary to avoid ILEC delay. As part of the SBC/Ameritech merger conditions in CC Docket No. 98-141, Covad's concerns have been fully addressed in a timely manner. To do more at this point than what those conditions require would be unreasonable and unnecessary and, as previously noted, unlawful. For all of these reasons, SBC respectfully requests that Covad's proposals be rejected.

Sincerely,

Martin E. Grambow

Martin E. Grambow
Vice President & General Counsel-Washington

cc: Carol Mattey
Margaret Egler
Jane Jackson
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OCT 08 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 8, 1999

By Hand

Magalie Roman Salas
Secretary
Federal Communications Commission
Room CY-A257
445 Twelfth Street, SW
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation
In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability
CC Docket No. 98-147

Dear Ms. Salas:

Transmitted herewith for inclusion in the public record of the above-referenced "permit but disclose" proceeding are two copies of a written *ex parte* letter that was delivered this day to Lawrence E. Strickling, Chief of the Common Carrier Bureau.

If you have any questions concerning this filing, please contact the undersigned.

Sincerely,

Charles W. Logan

Charles W. Logan

cc: Carol Mattey
Staci Pies
Jane Jackson
Howard Shelanski
Vincent Paladini
Margaret Egler
Pat DeGraba
Don Stockdale
David Hunt

Enclosure

October 8, 1999

By Hand

RECEIVED

OCT 08 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Communication
In the Matter of Deployment of Wireline Services
Offering Advanced Telecommunications Capability
CC Docket No. 98-147

Dear Mr. Strickling:

This written *ex parte* communication is submitted to you for consideration in connection with the above-referenced rulemaking proceeding. The submission is made on behalf of NorthPoint Communications, Inc., and HarvardNet, Inc., which are competitive local exchange carriers (LECs) that currently provide digital subscriber line (DSL) service in various markets in the United States (referred to hereafter collectively as "DSL competitive LECs").

Briefly stated, this submission summarizes the views of the DSL competitive LECs regarding both the importance of line sharing to the emergence of effective DSL competition, particularly for residential consumers, as well as the need for the prompt and effective availability of line sharing from incumbent LECs on reasonable terms, and conditions, including cost-based rates. In addition, in furtherance of the objective of making DSL services over shared lines available from competing providers expeditiously, the Commission should establish specific pricing principles to guide incumbent and competitive LECs as well as state commissions in implementing line sharing.

The Commission's establishment of a prompt deadline for the incumbent LECs to provide access to shared lines, of course, does not necessarily mean that they will comply with that requirement by offering access by that date on reasonable terms and conditions. As the Commission is aware, DSL competitive LECs have encountered substantial resistance and delays in attempting to implement the Commission's March 1999 order [1] that was intended to accelerate the deployment of co-located competitive LEC facilities

[1] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking (FCC 99-48), CC Dkt. No. 98-147 (Mar. 31, 1999) (*Advanced Wireline Services Order*).

in incumbent LEC offices.[2] Consequently, the DSL competitive LECs propose below interim arrangements for the provision of access to line sharing that incumbent LECs would be required to offer. One set of interim arrangements is intended to ensure that incumbent LECs that can offer line sharing to DSL competitive LECs as of the Commission-prescribed deadline make such access immediately available on reasonable terms. A second set of arrangements is designed to ensure that incumbent LECs that allege that they are unable to offer line sharing as of the deadline have an effective incentive to begin providing line sharing as promptly as possible and in the interim are not permitted to exploit their current anticompetitive advantage as the exclusive provider of DSL service over a shared line.

I. The FCC Should Require Incumbent LECs Promptly to Offer Line Sharing as an Unbundled Network Element

The comments filed in this proceeding by competitive providers of DSL services demonstrate that incumbent LECs should be required to offer line sharing as an unbundled network element,[3] pursuant to section 251(c)(3) of the Communications Act of 1934, as amended ("Act").[4] Indeed, the Commission's acknowledged in the Advanced Wireline Services Order that it had found "no evidence that line sharing was not technically feasible."[5] Moreover, although incumbent LECs previously raised various technical and operational objections to the provision of DSL services over a twisted copper pair that is simultaneously used for voice grade service,[6] those arguments largely appear to have been abandoned. The incumbent LECs themselves have refuted any such technical objections by offering DSL service over a line that also furnishes voice grade service to the same customer premises.[7]

More recent incumbent LEC assertions regarding operations support system (OSS) problems caused by the introduction of line sharing are similarly unfounded.[8] On

[2] *See, e.g.*, Letter from Charles I. Hadden, Counsel for Covad Communications Co. to Dorothy T. Attwood, Chief, Enforcement Division, at 9-19 (Apr. 20, 1999).

[3] *See, e.g.*, Comments of NorthPoint Communications, Inc. at 25-28 (June 15, 1999).

[4] 47 U.S.C. § 251(c)(3).

[5] *See Advanced Wireline Services Order* at para. 97.

[6] *Id.*

[7] *See, e.g.*, Bell Atlantic Telephone Companies, Trans. No. 1076 (Sept. 1, 1998).

[8] *See* Letter from Lincoln E. Brown, SBC Telecommunications, Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Dkt. No. 98-147 (Sept. 23, 1999).

September 30, 1999, several DSL competitive LECs filed a written *ex parte* submission consisting largely of a detailed analysis of OSS issues potentially raised by the incumbent LECs' provision of line sharing.[9] That analysis showed that for the most part, such problems could be addressed through modest enhancements to the incumbent LECs' systems and, in any event, interim procedures could be put in place almost immediately to permit the provision of line sharing while changes to the OSS were completed. In short, OSS issues related to the incumbent LECs' offering of line sharing are manageable and would not justify any delay in their compliance with an FCC order to offer access to line sharing as an unbundled network element.

Moreover, a delay in requiring the provision of access to shared lines clearly would have a significant adverse impact on competition in the DSL market. Because incumbent LECs today are the only carriers able to offer access to DSL service through a shared line, they enjoy anti-competitive pricing and provisioning advantages over DSL competitive LECs that are forced to obtain and pay the cost of a second, stand-alone loop to provide their DSL services. Those unfair advantages severely hamper the ability of new providers of DSL services to compete effectively with incumbent LECs to serve residential customers. Indeed, in some cases, residential customers may already be using their existing loops for voice and fax services. Obviously, the longer the delay in making access to shared lines available, the longer the delay in delivering the benefits of DSL competition to residential consumers (as well as the Internet service providers that purchase DSL service to deliver their retail service to end users). This consideration alone would justify the establishment of a prompt deadline for the provision of access to line sharing.

In addition to setting an expeditious deadline, the Commission also should provide specific guidance to incumbent LECs and state commissions concerning the terms, especially the prices, under which access to line sharing will be provided to competitive LECs. Such guidance is essential to avoid needless delays and uncertainty in implementing line sharing. Moreover, the two state commissions that commented on this issue in the rulemaking proceeding expressly supported the FCC's adoption of pricing rules for line sharing.[10]

The six types of costs that an incumbent LEC potentially could incur to provide access to line sharing are: 1) loops; 2) splitters; 3) cross connects; 4) OSS; 5) common costs (overhead costs); and 6) line conditioning and other non-recurring charges. We recommend below specific principles for setting prices for each of these costs that the Commission should require state commissions to follow in arbitrating line sharing agreements between incumbent LECs and competitive DSL LECs. Section 252(d)(1)(A)(i) of the Act requires that the rate for an unbundled network element be

[9] *See* Letter from Ruth Milkman to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Dkt. No. 98-147 (Sept. 30, 1999).

[10] *See* Comments of the State of California and the Public Utilities Commission of California, CC Docket No. 98-147, at 8 (June 15, 1999); Comments of Oklahoma Corporation Commission, CC Docket No. 98-147, at 19 (June 15, 1999).

"based on the cost ... of providing the ... network element ...."[11] The proposed principles are designed to ensure that the prices assessed by incumbent LECs for line sharing satisfy this statutory requirement.

With respect to the loop costs that may be allocated to line sharing, the Commission has a reliable benchmark for ensuring cost-based loop rates for line sharing. Specifically, the Bell Operating Companies (BOCs) and other large, incumbent LECs offer DSL services over shared access lines as interstate special access services. Under the FCC's applicable price cap rules for new access services, the recurring charges for such a service may not be set below the "direct costs" of providing the service,[12] which are comparable to incremental costs. Further, in the case of DSL offerings, actual and potential competition from cable-based high speed Internet access services would tend to force incumbent LECs to price its offerings at levels that approach their long run incremental costs. Consequently, in these circumstances, the Commission should require that the price of the loop component of line sharing not exceed the loop cost that the incumbent LEC allocates to its own DSL service provided over a shared line. For the same reasons, the Commission should hold that an incumbent LEC may allocate to line sharing no more than the common costs that it allocates to its own DSL service provided over a shared line. These pricing principles do not bar an incumbent LEC from modifying the loop and overhead costs allocated to its DSL access service offering. Rather, they simply require that such costs allocated to an incumbent LEC's line sharing network element not exceed the amount of the same costs assigned to its DSL access service offering.

With respect to OSS costs, incumbent LECs should be permitted to recover from line sharing charges only OSS costs that are incurred incrementally as a result of their obligation to offer access to line sharing. They should not be allowed to recover OSS costs that were incurred to provide their own DSL services over shared lines. The record in this proceeding, as supplemented by the recent Statement of Dennis J. Austin, shows that OSS costs associated with the implementation of line sharing likely will be *de minimis*. Hence, the incumbent LECs will bear a heavy burden in negotiating amendments to their interconnection agreements with competitive LECs if they wish to show that OSS costs are, in fact, significant.

Prices for cross connects should not pose any significant issue, since incumbent LECs currently provide such facilities to interconnect their loops with the co-located facilities of competitive LECs installed in incumbent LEC offices. Incumbent LECs should be required to furnish cross connects between a splitter and a competitive LEC's co-located equipment at the same price.

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[11] 47 U.S.C. § 252(d)(1)(A)(i).

[12] *See Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking (FCC 99-206), CC Dkt. No. 96-262, at para. 35 (Aug. 27, 1999); *see also* 47 C.F.R. § 61.49(f)(2).

Although the incumbent LECs do not currently provide access to a splitter as part of an unbundled network element offering, the Commission has the ability to bring market forces to bear on their provision of this segment of line sharing. Specifically, the Commission could direct incumbent LECs to provide access to a splitter as part of their line sharing unbundled network element, but also permit a competitive LEC, at its option, to purchase a splitter that complies with industry standards, and transfer it to the incumbent LEC, in the event that the competitive LEC can do so more quickly or at a lower price than the incumbent LEC.

The non-recurring costs that an incumbent LEC incurs to provide access to line sharing should be *de minimis*. Since the loop involved already would be in service, no costs would be incurred to activate the line. Indeed, the only task necessary to offer access to the shared line is the installation of a cross connect at the incumbent LEC's central office, a task that requires, at most, a few minutes to complete.

To the extent that any conditioning is required to facilitate the delivery of shared-line DSL service, costs related to such conditioning should be *de minimis*. In any case, conditioning charges for shared lines could never exceed the charges that incumbent LECs are permitted to recover for similar conditioning on stand-alone loops for DSL services.

In the view of the DSL competitive LECs, the foregoing pricing principles are straight-forward and relatively simple for state commissions to administer in an arbitration, particularly since the incumbent LECs submitted cost information with the FCC in support for their own offering of DSL over a shared line. These principles, however, are absolutely essential to the speedy deployment of DSL over shared lines by competitive LECs on terms and conditions that make the service affordable for residential consumers.

II. Incumbent LECs Should Be Required To Offer Line Sharing Pursuant to Interim Agreements With DSL Competitive LECs, Pending Agreement on Amendments to Their Interconnection Agreements

As discussed previously in comments and written *ex parte* submissions filed by DSL competitive LECs in this proceeding, there are no significant technical or OSS impediments to the incumbent LECs' prompt provision of access to line sharing as unbundled network element. Implementation of that requirement, however, will require amendments to the existing interconnection agreements between incumbent LECs and DSL competitive LECs. Under the procedures set forth in section 252 of the Act, that process could take up to nine months from the date the request for negotiation is received by an incumbent LEC.[13] Such a delay would further exacerbate the incumbent LECs' existing anticompetitive advantage and postpone the benefits of DSL competition for residential consumers.

[13] *See* 47 U.S.C. § 252(b)(4)(C).

The Commission, however, need not and should not tolerate any such delay. Rather, the Commission should use its discretionary authority under the Act (discussed below) to require incumbent LECs to offer access to line sharing under interim arrangements that would eventually be superseded by amended interconnection agreements between the parties. The Commission further should require the incumbent LECs to propose interim agreements that comply with the pricing principles outlined above, with one exception. Since the current record in this proceeding does not support a finding that the incumbent LECs' incremental OSS costs attributable are more than *de minimis*, the incumbent LECs should not be permitted to allocate any such costs to the charges for line sharing set forth in the interim agreements. As noted above, incumbent LECs would have the opportunity in the section 252 process to demonstrate that they in fact incurred incremental OSS costs in connection with the provision of line sharing and are entitled to recover those costs through their charges for access to this unbundled network element.

To implement this approach, we recommend that the Commission require incumbent LECs to offer such interim line sharing agreements to competitive LECs within 60 days after the Commission's order requiring the provision of line sharing became effective and that the interim agreements take effect within 30 days thereafter. An interim agreement would remain in effect until the incumbent and competitive LECs had agreed on an amendment to their interconnection agreement to govern the provision of line sharing on a longer term basis. At that point, the interim agreement would expire and be superseded by the amended interconnection agreement. Moreover, to foreclose potential claims of harm by incumbent LECs, the Commission could require that the pricing terms of such arrangements be subject to a "true up" after longer term line sharing agreements take effect. That is, to the extent that the prices for line sharing in the longer term agreements varied from the interim prices, incumbent LECs would be entitled to recoupment and competitive LECs would be entitled to refunds, as the case may be, for the period that the interim arrangements were in effect.

III. Incumbent LECs That Allege That They Are Unable to Provide Line Sharing On a Timely Basis Should Be Required to Offer "Surrogate Line Sharing" Until They Can Satisfy the Commission's Order

Despite the record evidence showing that incumbent LECs should be able to offer line sharing to competitive LECs promptly, it is conceivable that some incumbents may claim that they are unable to meet whatever deadline the Commission may establish for providing access to this unbundled network element. Rather than engaging in a protracted administrative proceeding about the validity of such a claim, the DSL competitive LECs suggest that the Commission require such incumbent LECs to offer "surrogate line sharing" on an interim basis until such time as they are able to comply with the Commission's order. This approach would both create a strong incentive for incumbent LECs to provide line sharing as quickly as possible as well as limit significantly their ability to exploit their current advantage as the sole provider of DSL over shared lines.

Specifically, incumbent LECs that are unable to provide non-discriminatory access to shared lines on a timely basis would be required to offer access to separate, unbundled loops at a very steep discount. We would suggest that the surrogate price be set at 10 percent of the applicable unbundled loop rate, because we believe that roughly would approximate the rate that we expect the negotiation/arbitration process will produce. In addition, to ensure that an incumbent LEC is not able to continue to exploit its current anticompetitive advantage over competitors by failing to provide line sharing, the Commission should bar incumbent LECs from serving new DSL customers over shared lines. Instead, incumbents would be required to offer service to new customers exclusively through the same facilities available to competitive LECs – separate loops. Under this approach, incumbent and competitive LECs would be placed on a substantially more level playing field in the DSL market than exists today.

We emphasize that this "surrogate" approach is not in any way an alternative method for an incumbent LEC to comply with its obligation to offer line sharing as an unbundled network element. Rather, it is an expedient means of mitigating the competitive harm of an incumbent LEC's inability to comply with that obligation. Indeed, BOCs that were unable to comply with the deadline to provide line sharing as an unbundled network element would be barred from obtaining authority to provide in-region interLATA services under section 271 of the Act until they were able to offer "[n]ondiscriminatory access to network elements."[14]

IV. The Commission Clearly Has Authority Under The Act To Adopt The Proposed Line Sharing Policy

The Act grants the Commission broad authority to adopt rules to implement the 1996 Act. The Supreme Court confirmed this in *AT&T Corp. v. Iowa Utilities Board*,[15] when it held that section 201(b) of the Act "means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which includes §§ 251 and 252, added by the Telecommunications Act of 1996."[16] Section 4(i) further provides that the "Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[17] Collectively, these provisions furnish the Commission with the authority to implement such measures as it may find, in the exercise of its expert judgment, necessary to accomplish the objectives of the Act.

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[14] 47 U.S.C. § 271(c)(2)(B)(ii).

[15] 119 S.Ct. 721 (1999).

[16] *Id.* at 730 (footnote omitted).

[17] 47 U.S.C. § 154(i).

In this case, the Commission's statutory authority empowers the agency to adopt initiatives that are designed to facilitate competition in the provision of advanced services to residential consumers and to address the current competitive disadvantages facing competitive LECs in offering these services. Such measures promote the explicit policy set forth in section 7 of the Act "to encourage the provision of new technologies and services to the public,"[18] as well the Commission's mandate in section 706 of the Act to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ...."[19]

Moreover, the Act does not require that the Commission accept potentially months of delay in the delivery of the benefits of advanced services competition to residential consumers. As noted above, because incumbent LECs today are the only carriers able to furnish advanced services over a shared line, depriving competitive LECs of any relief until the section 252 negotiation/arbitration process is completed would not only affect adversely the interests of consumers, but would further exacerbate the anticompetitive advantages that incumbent LECs currently enjoy. Consequently, there is a sound basis in the record of this proceeding for the Commission to order interim relief for competitive LECs, pending the completion of the section 252 process.

The Commission previously has used its authority under the Act to craft interim remedies that were designed to promote a smooth transition from the monopoly *status quo* to a different, pro-competitive regime. In the *Local Competition First Report and Order,* for example, the Commission recognized that availability of unbundled network elements at cost-based prices would enable long distance companies "to avoid totally the [carrier common line charges] and [transport interconnection charges], which in part represent contributions toward universal service, by serving their local customers solely through the use of unbundled network elements...." [20] The Commission, therefore, concluded that it should establish "a temporary transitional mechanism to help complete all of the steps toward the pro-competitive goal of the 1996 Act...."[21] Specifically, the FCC permitted incumbent LECs to continue to apply applicable interstate and intrastate switched access charges to toll traffic carried over unbundled loops and other network elements for an interim period until a new universal service plan was adopted. Subsequently, the Eighth Circuit sustained the Commission's establishment of that transitional scheme. [22] Noting that "substantial deference by courts is accorded to an

[18] 47 U.S.C. § 157(a).

[19] Pub. L. No. 104-104, 110 Stat. 56, § 706(a) (1996).

[20] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, at para.720 (1996).

[21] *Id.*

[22] *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997), *affirming in part Local Competition First Report and Order*, 11 FCC Rcd 15499, at ¶ 720 (1996). *See also MCI Telecommunications Corp. v. FCC*, 750 F.2d 135 (D.C.

agency when the issue concerns interim relief," the Eighth Circuit concluded that "[w]e do not think it contrary to the Act to institute access charges with a fixed expiration date, even though such charges appear on their face to violate the statute, in order to effectuate another part of the Act."[23]

The Commission's objective of promoting competition among providers of DSL services, particularly for residential consumers, in this proceeding similarly supports the implementation of a transitional scheme that will foster the emergence of that competition in the short run. The alternative, as noted above, is to allow incumbent LECs to continue to exploit their anticompetitive advantage until they enter into amended interconnection agreements with their competitors. Indeed, requiring incumbent LECs to offer interim arrangements is a reasonable way of creating an incentive to complete those negotiations as promptly as possible. Absent such arrangements, the incumbent LECs' incentives are to delay in order to maintain their market advantage. It bears emphasis that the adoption of this temporary relief would not interfere in any way with the procedures established by section 252 for negotiation and arbitration. Rather, the temporary arrangement would be superseded as soon as the section 252 process is completed. Moreover, the "true-up" process would ensure that the prices established for line sharing were determined by negotiation or arbitration, consistent with the statute.

Cir. 1984) (upholding FCC's adoption of interim freeze of separations formula allocating costs of nontraffic sensitive plant between intrastate and interstate jurisdictions).

[23] *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d at 1073-74.

In sum, we urge the Commission to move expeditiously to require incumbent LECs to offer access to line sharing as an unbundled network element at cost-based prices. Further, the Commission should mandate that incumbent LECs offer interim arrangements, either line sharing or "surrogate line sharing," until they complete the process of amending their interconnection agreements with competitive DSL providers to include access to line sharing.

Respectfully submitted,

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